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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1214

EDWARD SCHENKER and DAVID SCHENKER, on behalf of themselves and all other Stockholders of the Cumulative Preferred Stock without par value $3.50 Series and Cumulative Preferred Stock without par value $4.50 Series of E. I. du Pont de Nemours & Company Incorporated,

Petitioners,

v.

E. I. DU PONT DE NEMOURS & COMPANY INCORPORATED,

Respondent,

et al.,

Defendants.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether, under Delaware law, the distribution of General Motors stock by Du Pont to its common stockholders, such distribution being made wholly out of surplus, violates any rights of the Du Pont preferred stockholders as against the rights of the common stockholders.

2. Whether, under Delaware law, such distribution violates any fiduciary obligation of the Du Pont directors, or of any other persons, to the preferred stockholders.

3. Whether, under Delaware law, such distribution constitutes any "liquidation or dissolution or winding-up of the corporation," within the meaning of the corporate charter, entitling the petitioners to the redemption price of their preferred stock.

Statutes Involved

Apart from the Rules of Decision Act (28 U. S. C. §1652), which is set forth at page 6 of the Petition, the only statutes involved are those of the State of Delaware relating to the respective rights of preferred and common shareholders, found in Delaware Corporation Law, Sections 151 and 170. The pertinent text thereof is set forth in Appendix A.

Statement of the Case

In this action the petitioners, as holders of preferred stock of the Du Pont Company, sought an injunction against distribution of Du Pont's holdings of General Motors stock to the common stockholders of Du Pont; or, in the alternative, a money judgment for the liquidation value of the preferred stock which is payable under the applicable charter provisions upon a voluntary liquidation of the Company.

The necessity for divestiture of the General Motors investment arises from the final judgment entered by the District Court for the Northern District of Illinois

pursuant to the decision of this Court in *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U. S. 316 (1961). The final judgment did not specify the means of divestiture by Du Pont and merely directed that it be accomplished by February 28, 1965 (A58-59).*

The Board of Directors has decided to effect the divestiture by distributing all or substantially all of the General Motors stock to the common shareholders of the Company (A5, 29, 59). The distribution of the General Motors stock will be made out of surplus and will leave the Company with unimpaired capital, with a growing surplus which at the end of 1961 was over $1,200,000,000 after allowing for the distributions, and with no change in the nature or scope of the commercial activities which constitute its main business (A27-29, 52).

After the distribution the Company will retain assets having a book value of 7.2 times the stated value of all outstanding preferred stocks and annual net income in excess of 27 times the preferred dividend requirement (A26, 51-54). This asset and earnings coverage of the preferred stocks, without the General Motors investment, is substantially greater than the coverage, including the General Motors investment, which existed when the preferred shares were issued (A26-27, 40-41, 46-48, 51-54). These ratios are as of the end of 1961, and as of the present would be greater. Furthermore, the asset coverage is based on book value which in no way reflects the vastly greater value placed on such assets by the investing public, as indicated by the market price for Du Pont common stock.

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* References marked "A" are to the Joint Appendix submitted with the Petition.

The record demonstrates that the Du Pont Company is one of the leading corporate enterprises in the country with an outstanding record of success in the chemical industry. The growth in its own commercial enterprises has been steady and substantial. This growth has been supported in large part by the reinvestment of earnings other than from its investment in General Motors, amounting since the last issuance of preferred stock to over $1,000,000,000, which would otherwise have been available for distribution to the common shareholders (A52). At the trial there was uncontradicted expert evidence that after distribution of the entire General Motors holdings, the investment characteristics of the Du Pont preferred shares would still warrant their inclusion "among the highest quality preferred stocks"; and that these shares would continue to receive AAA rating (A23, 79, 120, 124-125).

Under Delaware law and under the applicable charter provisions, the preferred shareholders are entitled (1) to certain specified dividends and no more before any dividends can be paid on the common, and (2) in the event of liquidation to be paid a certain specified dollar amount and no more (Del. Corp. Law §§151, 170; A20-21, 43, 46, 49-50). They are thus protected from the risks which go with the equity position. The common shareholders on the other hand have these risks and with them they have the concomitant opportunities of increase in their equity.

There has never been any doubt that the directors of the Du Pont Company owe the highest fiduciary duty to the stockholders of all classes, both preferred and common. The District Court, after a careful review of the facts, concluded that this fiduciary obligation had been fully performed (A30-31). The Court of Appeals

expressly agreed with the findings and conclusions on this point. *Schenker* v. *E. I. du Pont de Nemours & Company*, 329 F. 2d 77, at 78-79 (2d Cir. 1964).

The evidence shows that the directors and the management of the Du Pont Company acted with great care and with meticulous concern for all the interests involved in dealing with the difficult problems relating to divestiture of the General Motors investment (A22-25, 96-119). The plan of distribution which they have adopted is logical and fair in that it transfers a portion of the equity in the Du Pont Company to the owners of the equity and maintains for the preferred shareholders the fully protected and preferred position to which their bargain entitles them.

ARGUMENT

I. No Federal Question is Presented

The only questions of law presented or decided in this case have to do with the respective rights and interests of the preferred and common shareholders of a Delaware corporation and the extent, nature and performance of the fiduciary obligation owed by the directors of the corporation on the facts here presented. These are questions of Delaware state law and were expressly treated and decided as such both in the District Court and in the Court of Appeals (A29-30; 329 F. 2d at 78).

II. No Matter of Federal Concern is Involved

The fact that the divestiture of the General Motors investment is required by the judgment in a federal antitrust case does not justify the conclusion that the

questions here presented have any bearing on the administration or enforcement of the antitrust laws. The divestiture will be just as complete and effective whether it is made by distribution to the common stockholders or whether it is accompanied by the redemption of the preferred shares. The appropriate recognition of the rights of the various classes of security holders of the Du Pont Company remains a matter of state law and is not of federal concern. See *Wolfe* v. *Weinstein*, 372 U. S. 633, at 634-636, *rehearing denied*, 373 U. S. 928 (1963).

It happens that the method of divestiture adopted by the Board of Directors in this case is precisely the one which was initially demanded by the Department of Justice in the federal antitrust case (A9, 61). At the conclusion of that case, however, the method of divestiture was left to the business judgment of the Board of Directors of the Du Pont Company (A11, 58). And that Board was only doing its duty when it adopted the method of divestiture which was in accordance with the rights and interests of the different classes of stockholders under the governing law of Delaware.

III. The Decision Below is Clearly Correct

The District Court made detailed and extensive findings of fact on all matters in controversy. These findings were reviewed by the Court of Appeals and have been affirmed. These findings show that the distribution to the common stockholders will be made entirely out of surplus and that the preferred position of the petitioners and other preferred shareholders will continue to be amply protected. In these circumstances the

conclusion that nothing is being done to the injury of the preferred shareholders is clearly correct.

The real contention of the petitioners is that since the directors owed a fiduciary obligation to them, it became incumbent upon the directors to benefit the preferred shareholders at the expense of the common in planning the method of divestiture. This contention overlooks the fact that the directors equally owed a fiduciary obligation to the common stockholders.

The fact is that the personal interests of the directors would have been served by an exchange offer to the preferred shareholders, inviting them to turn in their stock at a premium in exchange for General Motors stock (A23-24, 97-106). Such an offer would have been disadvantageous, however, to the great body of common stockholders, some 210,000 in number, and would have amounted to a windfall to the preferred holders at the expense of most of the common holders. The directors rightly concluded that this should not be done.

Little need be said about the petitioners' alternative claim to recover the liquidating value of their shares. The charter provides that in the event of "any liquidation or dissolution or winding-up of the corporation" certain fixed amounts shall be paid to the preferred shareholders and the remaining assets of the corporation shall be distributed among the common shareholders (Appendix B). This provision clearly contemplates a situation in which the corporation is to cease to exist as a going concern and its assets are to be divided among the various interested parties. In the present case, the Du Pont Company will continue to be one of the great corporate enterprises of this country, having a thriving, going business with large assets and earnings.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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Appendix A

General Corporation Law of the State of Delaware (Title 8, Delaware Code of 1953)

"§151. Classes and series of stock; rights, etc.

"(a) Every corporation may issue one or more classes of stock or one or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value, with such voting powers, full or limited, or without voting powers and in such series and with such designations, preferences and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of the certificate of incorporation or of any amendment thereto. The power to increase or decrease or otherwise adjust the capital stock as provided in this chapter shall apply to all or any such classes of stock.

* * * * * *

"(c) The holders of preferred or special stock of any class or of any series thereof shall be entitled to receive dividends at such rates, on such conditions and at such times as shall be stated and expressed in the certificate of incorporation, or in any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided, payable in preference to, or in such relation to, the dividends payable on any other class or classes of stock; and cumulative or non-cumulative as shall be so stated and expressed. When dividends upon the preferred and special stocks,

if any, to the extent of the preference to which such stocks are entitled, shall have been paid or declared and set apart for payment, a dividend on the remaining class or classes of stock may then be paid out of the remaining assets of the corporation available for dividends as elsewhere in this chapter provided.

"(d) The holders of the preferred or special stock of any class or of any series thereof shall be entitled to such rights upon the dissolution of, or upon any distribution of the assets of, the corporation as shall be stated and expressed in the certificate of incorporation, or any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided."

* * * * * *

(4 Delaware Code Annotated 90)

"§170. Dividends; payment; wasting asset corporations

"(a) The directors of every corporation created under this chapter, subject to any restrictions contained in its certificate of incorporation, may declare and pay dividends upon the shares of its capital stock either (1) out of its net assets in excess of its capital as computed in accordance with the provisions of sections 154 and 242-244 of this title, or (2) in case there shall be no such excess, out of its net profits for the fiscal year then current and or the preceding fiscal year. If the capital of the corporation computed as aforesaid shall have been diminished by depreciation in the value of its property, or by losses, or otherwise, to an amount less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets, the directors of such corporation shall not declare and pay out of such net profits any dividends upon any

shares of any classes of its capital stock until the deficiency in the amount of capital represented by the issued and outstanding stock of all classes having a preference upon the distribution of assets shall have been repaired."

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(4 Delaware Code Annotated 143)

Appendix B

Charter of E. I. du Pont de Nemours and Company, Article Fourth

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"V. In the event of any liquidation or dissolution or winding-up of the corporation, whether voluntary or involuntary, the Preferred Stock shall entitle the holders thereof to be paid the amounts fixed herein or fixed by the Board of Directors for the respective series as herein provided, including all unpaid accumulated dividends thereon to the date of such payment, before any amount shall be paid to the holders of the Common Stock of the corporation.

Such payments to the holders of the Preferred Stock shall be made without preference or priority of one series over any other series and shall be made before any amount shall be paid to the holders of the Common Stock. If the assets of the corporation distributable upon any such liquidation or dissolution or winding-up of the corporation shall be insufficient to permit the payments to the holders of the Preferred Stock of the full amounts above provided for, including an amount equivalent to all unpaid accumulated dividends as aforesaid, the said assets shall be allocated to the respective series of Preferred Stock in the ratios that such aggregate liquidation value of the issued shares of each series bears to the aggregate liquidation

value of the issued shares of all series of Preferred Stock as fixed for the respective series of Preferred Stock in the Certificate of Incorporation or in the resolution or resolutions of the Board of Directors providing for the issuance of the respective series, and shall be distributed among the holders of the respective series of Preferred Stock according to their respective shares.

* * * * * * *

"IX. Upon any liquidation or dissolution or winding-up of the corporation, whether voluntary or involuntary, the assets and funds of the corporation remaining, after the payments have been made to the holders of the Preferred Stock, as provided in Section V hereof, shall be divided and paid to the holders of the Common Stock according to their respective shares."

* * * * * *